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2 IN THE UNITED STATES DISTRICT COURT  
3 FOR THE WESTERN DISTRICT OF VIRGINIA  
4 CHARLOTTESVILLE DIVISION

5 BRENNAN M. GILMORE, )  
6 Plaintiff, ) Civil Case No.  
7 vs. ) 3:18-cv-00017-NKM-JCH  
8 ALEXANDER E. JONES, et al, ) Tuesday, October 19, 2021  
9 Defendants. )

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11 TRANSCRIPT OF DISCOVERY DISPUTE  
12 MAGISTRATE JUDGE JOEL C. HOPPE PRESIDING  
13 UNITED STATES DISTRICT COURT  
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25 Proceedings recorded by FTR and transcribed using computer

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1 (FTR recording began at 9:35 A.M.)

2 THE COURT: All right. And quickly, who's on the  
3 line for the plaintiffs?

4 MR. GRAVES: Good morning, Your Honor. This is  
5 Anwar Graves with O'Melvney and Meyers. I'm joined by my  
6 colleague, Hassen Sayeed.

7 MR. SAYEED: Good morning, Your Honor.

8 THE COURT: Mr. Randazza, you're on the line?

9 MR. RANDAZZA: Yes, Your Honor. And my colleague,  
10 Jay Wolman is on as well, I believe.

11 Jay, are you here?

12 MR. WOLMAN: Yes, I am. Thank you.

13 Good morning, Your Honor.

14 MR. GRAVES: And, Your Honor, on behalf of the  
15 plaintiffs, we also have Kimya Saied.

16 THE COURT: Yes. Yes, I think I've got that.

17 All right. And then how about for the Free Speech?

18 MR. RANDAZZA: I'm sorry, Your Honor, somebody's --

19 THE COURT: Someone's typing in the background.

20 Whoever is typing, please put your phone on mute. It's hard  
21 to hear other people speaking.

22 For the Free Speech defendants, who's on the line?

23 MR. RANDAZZA: That would be myself, Mark Randazza,  
24 and Mr. Wolman.

25 THE COURT: All right. Let's see, and then how

1 about Mr. Stranahan, are you on the line? Is Mr. Stranahan on  
2 the line?

3 Okay. How about Mr. Creighton?

4 MR. CREIGHTON: Yes. Good morning, Your Honor, I'm  
5 here.

6 THE COURT: All right. Good morning.

7 Let's see, and then, Mr. Burns, are you on the line  
8 for Mr. Hoft?

9 MR. BURNS: Yes, Your Honor. Good morning.

10 THE COURT: Good morning.

11 All right. I think that's everybody who should be  
12 on the line; is that right?

13 MR. WACHEN: Your Honor, David Wachen on behalf of  
14 Defendant Lee Ann McAdoo is also on the line.

15 THE COURT: Mr. Wachen, that's right.

16 Good morning.

17 All right. Well, counsel and Mr. Creighton, I think  
18 I'd ask, Mr. Graves, were you anticipating Mr. Stranahan being  
19 on the line?

20 MR. GRAVES: I don't believe so. I haven't heard  
21 from him and none of these issues pertain to him, unless  
22 Your Honor decides to go into trial scheduling. So I don't  
23 see a need for him to be here, unless we have that  
24 conversation.

25 THE COURT: Well, and that was one thing I thought

1 we were going to take up is getting this scheduled to trial.

2 MR. GRAVES: Yeah. And so I know we corresponded  
3 with Mr. Stranahan via e-mail. And I think we -- I mean, the  
4 entire -- all the parties here are included on those  
5 communications. I don't recall him having any objection to  
6 the dates that we were offered, but I don't want to confirm  
7 that without him making his own representation to the Court on  
8 that.

9 THE COURT: Okay. All right. Well, why don't we  
10 just -- can we take up that issue getting this case set for  
11 trial. In looking at the e-mail about the various conflicts,  
12 it seems like there should be some time to get, what is that,  
13 an 8-day trial scheduled certainly before next fall.

14 Are there any times -- it looks like there's some  
15 windows perhaps in the late spring, early summer for the  
16 parties.

17 MR. GRAVES: Yes. I know as a group we all were  
18 corresponding about this issue, and we thought we would take  
19 the Court on its offer of late July, early August as a trial  
20 date. But I believe Mr. Randazza believed that he might be in  
21 trial during that timeframe. And so, I guess I'd defer to him  
22 as to whether or not he has a conflict during that time.

23 I know one thought that we had was if we -- if there  
24 was a conflict, we all know how trials can sometimes go away.  
25 Maybe we could schedule something end of summer and then have

1 another scheduling conference in the spring to see if our  
2 current conflicts are still conflicts or if they've gone away.

3 With that said, I'll turn this to Mr. Randazza  
4 because I believe he had the conflict in the summer.

5 MR. RANDAZZA: Yeah, I'm going to defer to  
6 Mr. Wolman on this because he -- this is a -- it's a  
7 Connecticut matter, and I will not pretend to understand the  
8 peculiarities of the Connecticut practice book.

9 So, Jay, I'm going to tag you in here.

10 MR. WOLMAN: All right. Thank you. Good morning  
11 again, Your Honor, Jay Wolman.

12 So Your Honor is familiar that Mr. Jones, Free  
13 Speech Systems, LLC, and Infowars, LLC, are also defendants in  
14 other litigation, which includes a case in Connecticut that's  
15 been ongoing since 2018. Filed, I believe, two months after  
16 this case was filed. That trial date has moved a few times as  
17 well. And it is presently scheduled, it kind of gets a little  
18 funny, where it gets marked down in the calendar as the start  
19 of jury selection/trial. But as with any other case, jury  
20 selection comes first, obviously. Because the nature of the  
21 case which arises from Sandy Hook-related publication  
22 statements, the Court has scheduled and anticipated  
23 essentially a one-month period for jury selection, which is to  
24 begin on August 2nd, with then opening statements/evidence the  
25 first week of September, depending upon, more or less, when

1 the jury selection wraps up.

2 As Your Honor can expect, the Sandy Hook incident is  
3 highly sensitive in Connecticut and pretty much can't find  
4 anyone who doesn't have an opinion, wasn't affected by it in  
5 the state, especially in the counties closest to New Town,  
6 Connecticut. And the process for selecting a jury in  
7 Connecticut is pretty much unlike any I'd seen throughout the  
8 country. I can't claim to be familiar with all 50 states.  
9 But it is private individual voir dire of witnesses where the  
10 parties actually get to voir dire -- not witnesses, the  
11 jurors, potential jurors, outside the presence of the judge.  
12 And then, of course, we bring in the judge as absolutely  
13 necessary. And certainly having one's client involved in the  
14 process of selecting the juror is crucial in order to  
15 maintain, you know, due process and make sure their client has  
16 a fair trial. And so we're starting that process on  
17 August 2nd.

18 And, of course, the week beforehand is a lot of  
19 preparation. Presumably there will be some motions that will  
20 lead into that. So I want to make sure that the Court and the  
21 parties are clear as to, you know, the nuance of Connecticut  
22 and how lengthy that's going to be.

23 It's going to be a long trial in and of itself.  
24 There are now 15 plaintiffs in that case, multiple defendants,  
25 not even just our clients. I want to make sure that the Court

1 has a full picture of that.

2 THE COURT: Okay. All right. And what about --  
3 have you -- did you-all look at getting dates in June or  
4 earlier in July from Heidi?

5 MR. GRAVES: I don't have that. Let me -- I'm  
6 trying to pull up the dates that she offered to us.

7 I believe there was a conflict with the spring, but  
8 I'm trying to refresh my recollection. I remember there's a  
9 reason why we chose the summer, why we thought that might be  
10 best, but I am trying to find our correspondence on that  
11 issue. And my apologies for not knowing offhand.

12 UNIDENTIFIED SPEAKER: I'm looking at an e-mail from  
13 September 1st where she suggests July 27th through 29th and  
14 August 1st through 5th. And then she suggests any 8-day  
15 combination in August.

16 THE COURT: All right. So what I was saying, if  
17 you-all think that the case could be ready for trial by --  
18 well, by sometime in May.

19 MR. GRAVES: I think it depends. I think there are  
20 (indiscernible) fact discovery, and there may be issues. As  
21 Your Honor knows, we're discussing another motion to compel  
22 related to discovery. I know there's one currently pending.  
23 And I don't believe any of us are -- want to take the ultimate  
24 depositions, meaning of the main parties, until these  
25 discovery issues are resolved. So that's one complication, I



1 guess.

2 And then regardless of the way the Court rules, if  
3 the Court grants these various motions, then actually there  
4 will be some time needed to produce them and for review of  
5 those documents. And then after that we'll have to have  
6 expert discovery. As Your Honor knows, we're dealing with  
7 analytics, so our damages experts will have to review those.  
8 Once those are actually reviewed -- or produced, or I assume  
9 Your Honor grants that motion, if you do, they'll need to  
10 review that. They'll need to do a report. They'll need to be  
11 deposed. And then we'll obviously have summary judgment  
12 briefing. So I assume that May may be a little tight. But if  
13 the defendants have an opposing view, I'd defer to them and  
14 what their thoughts are.

15 THE COURT: All right. Well, what I'll do on the  
16 trial then is I would just suggest that -- that you contact  
17 Heidi and see if there are any dates in June or earlier in  
18 July for that 8-day trial. It seems like that -- you know,  
19 that should work with the schedule.

20 I'm not sure why -- maybe we're looking at end of  
21 July and August just to be abundantly cautious. But if August  
22 just isn't going to work, counsel is not available, the  
23 parties aren't available, then there's not -- it sounds that  
24 way.

25 So, and then on the motion to compel, talking about

1 Free Speech Systems, is there a request for hearing on that or  
2 do you want me just to address that on the papers?

3 MR. WOLMAN: Your Honor, this is Jay Wolman. I  
4 believe that could be addressed on the papers.

5 THE COURT: All right. Mr. Graves or Mr. Sayeed,  
6 would you like a hearing in the matter, or would you like it  
7 just to be addressed on the papers?

8 MR. GRAVES: I never like to pass up an opportunity  
9 to have a hearing, but I guess -- if a hearing -- I guess if  
10 the Court believes that a hearing would be helpful to help  
11 discuss or clarify some of the issues that are present, we'd  
12 definitely be amenable to one. But I think we'd be fine  
13 proceeding on the papers as they are written.

14 MR. SAYEED: And I may join Mr. Graves in that, you  
15 know, sentiment. I want to make sure that's clear. As far as  
16 the Court believes it's beneficial, we are happy to do it.

17 THE COURT: Okay. Well, thank you for that. I will  
18 plan on addressing that motion on the papers.

19 MR. GRAVES: Okay.

20 THE COURT: Okay. All right. So, I'll make sure  
21 that Heidi knows that you're going to be in touch with her  
22 this week to try and get a date for the trial in June or the  
23 first part of July. And then after that's set, we can --  
24 you-all can confer about a schedule. And if we need to have a  
25 hearing on the schedule, we can do that.

1 MR. GRAVES: Sounds good.

2 THE COURT: Okay. All right. And I think that  
3 there were kind of two groups of discovery issues to take up.

4 MR. GRAVES: Yes, Your Honor.

5 THE COURT: So Mr. Hoft's supplemental productions  
6 and then the other is discovery requests for marketing and  
7 analytics data from the Free Speech defendants and also  
8 Mr. Hoft.

9 MR. GRAVES: That's correct. And which issue would  
10 you prefer us to address first?

11 THE COURT: Well, why don't we take up the marketing  
12 and analytics.

13 MR. GRAVES: Okay. Yeah, with regards to that --  
14 and let me set the table a little bit. This has been an issue  
15 within the Sandy Hook cases in Connecticut, this particular  
16 question of analytics. The court granted those requests. But  
17 the reason why we learned of certain things I'm about cite to  
18 during our discussion on this is a lot of deposition testimony  
19 was taken in that case related to analytics. And those  
20 transcripts were produced as part of public filings related to  
21 motions to compel which we have read to review and to learn  
22 about the Infowars operation that becomes the analytics and  
23 how the analytics reviews within that organization.

24 So taking it from a higher level, just so Your Honor  
25 is aware, analytics are a tool of e-commerce businesses. They

1 typically allow one to track sales activity, demographics,  
2 unique users that come to a website, those types of -- that  
3 type of data is what analytics specifically is. And those  
4 analytics are stored on a cloud-based server. So typically  
5 one would just log into a server, pull down a report, you  
6 know, enter using a password, download various reports,  
7 however they want to slice and dice the data, and they can use  
8 that to inform their business practices is typically how  
9 analytics are used.

10 In regards to Infowars specifically, there's been  
11 testimony provided by a few people related to how they're used  
12 at Infowars. One with Alex Jones's father, who at the time  
13 that he testified, or in May of 2019, he was the manager of  
14 human resources at Free Speech Systems. And he said that Free  
15 Speech Systems would look at these analytics, specifically the  
16 sales spikes, and that Free Speech Systems will attempt to  
17 recreate whatever narrative or assertion, or allegations were  
18 made within that broadcast that produced the high spike, where  
19 they can routinely see high sales that would (inaudible) with  
20 their publication.

21 He said that they looked at specifically unique  
22 visitors, click views, how people were referred, how long did  
23 they stay on the site, and used all of that to govern their  
24 business.

25 Robert Du, who is their nightly news director, says

1 that he does the same thing but on YouTube. He does that.  
2 And the purpose of doing that is to assess whether Free Speech  
3 Systems should publish a particular video on its website. And  
4 YouTube, same with their rationale, a popular video would  
5 attract an audience which in turn would attract people to buy  
6 certain products from their store. There's similar testimony  
7 from their IT manager and also from their business manager.

8 And so the relevance of this data is, number 1, it  
9 goes to malice. It shows is there a business incentive or a  
10 business motivation for producing certain types of story. And  
11 the benefit of looking at that, as Your Honor knows, is that  
12 it's our burden, obviously, to prove that actual malice  
13 occurred here. And one way that courts have allowed for that  
14 point to be established is through the business marketing  
15 metrics plan and analytics and things (inaudible.)

16 Similarly, it also is relevant to getting the sense  
17 of revenue data. How much money was made off of these  
18 publications? As Your Honor may know, we've heard in  
19 discovery related to revenue that was garnered by the Infowars  
20 or Free Speech Systems through these publications. And in  
21 their response was that because YouTube has deleted the  
22 channel, they couldn't really gather any response or documents  
23 with (inaudible.) So analytics is a way for us to back door  
24 that information and also pick up what were the specific  
25 financials related to these specific publications.

1           So duly seeking that is the long and short as to why  
2 we're seeking this data. We were told by Infowars defendants  
3 and also by Mr. Hoft that they're refusing to produce it. So  
4 they're not saying that it does not exist, but that they don't  
5 believe that it's relevant and should not be produced to us.

6           THE COURT: All right. And it looks like from their  
7 responses that -- let's see, that Infowars says it has no such  
8 responsive documents. And then Mr. Jones and Free Speech, I  
9 think their response is that each one of them is withholding  
10 any such responsive documents. (Inaudible.)

11           Tell me about the timeframe in your request. It  
12 looks like (inaudible). Why is that (inaudible) reasonable  
13 scope?

14           MR. GRAVES: Sure. Well, first of all, the January  
15 through August date is what is done in every discovery request  
16 in this case. January 2017 being the start of the year where  
17 (inaudible.) And April 2018 is the filing of the amended  
18 complaint. So that has been the timeframe that we've used for  
19 everything.

20           Why is that critical for this request? It is  
21 because it's important for us to establish a trend line. We  
22 need to see spikes. So, for example, as Your Honor knows  
23 through addressing the various motions in this case, courts  
24 have -- or I should say litigants or plaintiffs have shown  
25 that there may be a business motivation by looking at spikes.

1 So we've noticed that there's a trend line. If someone says X  
2 in April, they noticed their sales go up. So let's see if we  
3 can repeat that behavior again in June, in August, and  
4 November. And so we need to be able to establish that so that  
5 our experts can make opinions and render opinions on whether  
6 or not there is a business motivation involved.

7 Is there a trend that they're able to see and pick  
8 up on where certain events trigger more viewers when certain  
9 assertions are made on the broadcast? So we can't do that in  
10 isolation. We need to be able to see that.

11 It's akin to -- if you'll recall during our last  
12 hearing when we were discussing Mr. Gilmore's discovery  
13 responses, the defendants argued that they need to see a  
14 longer timeframe of publication to see what his baseline was  
15 prior to the event when it comes to publications, or his  
16 reputation in the community and how it extended after the  
17 Unite to Right rally and after he published his video.

18 Similar here, we need to see a baseline. See where  
19 things have spiked and where they have not. So that's why the  
20 timeframe is relevant.

21 The last request, which as Your Honor knows, we  
22 submitted three RFPs related to this topic. The last one of  
23 those does not have a built-in timeframe, and the reason why  
24 is because we're only looking for the request. And  
25 specifically, the reason why that's relevant is we want to see

1 the targeted nature of the request.

2 So, for example, if Info -- Alex Jones sent a note  
3 to Google saying I want to see what events over the past four  
4 years have triggered the greatest amount of sales so I can  
5 increase my own sales. Or I want to see what type of events  
6 got the most clicks. Those requests like that can be made at  
7 any time. But they could pull information that's responsive  
8 to this matter, Number 1. And Number 2, just the nature of  
9 the request and how it's framed could be insightful as to why  
10 it's relevant to Free Speech Systems. And so we wanted to see  
11 those -- just that communication, not so much any broad  
12 responses we may observe. In our opinion there's something  
13 really enlightening there, insightful there. But that is what  
14 we're looking at just to see how they target their request to  
15 YouTube and to these other entities.

16 And one thing I will note just so that Your Honor is  
17 aware, these materials have already been produced. So this  
18 isn't an issue of them having to do a substantial amount of  
19 work and searching. They're simply just reprinting or  
20 repackaging what's already been produced in Connecticut. And  
21 that shoulda shortened timeframe. Connecticut had a much  
22 longer window of time. We're looking for a much more discrete  
23 period with regards to two, at least, their requests -- two of  
24 their requests.

25 THE COURT: Okay. All right. Thank you.



1           Let's see, Mr. Randazza or Mr. Wolman, do you want  
2           to address that?

3           MR. WOLMAN: Sure. If I may, Your Honor, this is  
4           Jay Wolman. You know, the Connecticut case is governed under  
5           the Connecticut practice book under different, you know,  
6           rubric. What the Connecticut judge determined to be under  
7           Connecticut law, which also is, again, you know, interlocutory  
8           opinion that could be subject to appeal where she gave no  
9           explanation as to why she would order certain production, that  
10          is not in any way persuasive or binding on this court and  
11          should not be looked to.

12          The issue here is --

13          THE COURT: Didn't I already address this issue, at  
14          least in, you know, to some extent, in a January order from  
15          earlier this year? I said that the marketing and research  
16          interrogatories -- I mean, they are different requests, but  
17          they're sort of the same general subject matter -- was  
18          probative as to the showing of actual knowledge?

19          MR. WOLMAN: And while we understand that some  
20          things may, in terms of marketing, you know, tend to show  
21          actual malice, there's nothing here in terms of what's been  
22          represented by the plaintiff that this data would be, that it  
23          actually drove any particular content, any editorial takes,  
24          any, you know, opinions here. Any -- we're dealing with a  
25          couple of publications from Free Speech Systems that were done

1 right as Charlottesville was, you know, happening. That was  
2 the news of the day as a general proposition. There's no  
3 indication whatsoever from anyone in this case that that had  
4 anything -- that any analytics were addressed in terms of  
5 what, you know, Ms. McAdoo's publication interview with  
6 Mr. Stranahan that was aired on Free Speech Systems or  
7 Mr. Jones's one, you know, brief commentary on Mr. Gilmore.  
8 There's nothing that has been indicated at all in this case to  
9 suggest that this expansive need for analytics data is  
10 necessary.

11 Now, I also need to address the scope of their  
12 request. You know, this is the first time I'm hearing  
13 Mr. Graves limiting it to what was produced in Connecticut.  
14 Because the entire scope of the request is for analytics data.  
15 Well, one, the only thing we can really do to export Google  
16 analytics is to become, for example, an Analytics 360 member  
17 to get the raw data, and that costs \$150,000 is my  
18 understanding. And if Mr. Gilmore wanted to put that up,  
19 that's up to him. But, otherwise, if you're looking for  
20 certain reports that are already in existence, you know, or  
21 can easily be produced, that's not the entirety of analytics.

22 What we have produced in terms of, you know, what --  
23 already, if I recall correctly, is that if you go into Google  
24 Analytics and you punch in Charlottesville, you know, it was a  
25 very small return in terms of sales that could be tied to any

1 articles or any publications on the Infowars website that are  
2 directly attributable to any article that says  
3 Charlottesville, let alone anything that would then more  
4 narrowly mention Mr. Gilmore. There's nothing to suggest that  
5 we should have to undertake to produce any of this where there  
6 is no showing that analytics in any way drove the two  
7 publications at issue and given the breadth of it. We don't  
8 believe that we're entitled to Connecticut. But, you know,  
9 things were produced in June of 2019 to opposing counsel in  
10 that case. And if the Court orders --

11 THE COURT: Mr. Wolman, tell me about -- you said  
12 there's nothing that indicates that this analytics drove the  
13 statements at issue in this case. I mean, is that -- is that  
14 the issue that, I guess, is in dispute between the parties?  
15 And you're saying that as if it's established. What -- tell  
16 me more why you think it's established.

17 MR. WOLMAN: Let's look at the case, Your Honor.  
18 What we have first is an interview that Ms. McAdoo did with  
19 Mr. Stranahan that was published on Infowars. You know,  
20 that's the major one that they point to. And in that, you  
21 know, there's been nothing to suggest Mr. Stranahan was  
22 motivated by any form of analytics to, you know, make his  
23 statements or that Ms. McAdoo in acknowledging Mr. Stranahan's  
24 statements as a host would have seen in terms of analytics  
25 going forward and deciding to do this project, do this

1 interview.

2           Neither is there anything in what's been produced to  
3 suggest that Mr. Jones's statement on, I forget which state it  
4 was, afterwards, that his decision on the topics of the day  
5 had anything to do with, you know, the analytics based on the  
6 prior interview Ms. McAdoo did with Mr. Stranahan. There is  
7 none of that. You know, so why do you even need to look at  
8 analytics when there's been nothing in the discovery to date?  
9 And they've had opportunity to depose folks before going into  
10 this invasive discovery request to then say we need this to  
11 establish their motivation for actual malice. No, because  
12 they have no baseline to say that analytics were done here.

13           You know, if analytics were used a handful of times  
14 over the course of, you know, an 8-year period as one would  
15 look at in the Sandy Hook case, that doesn't mean that  
16 analytics were specifically used for the two publications at  
17 issue for Free Speech Systems. And so why should we have to  
18 do any of this intrusive, potentially exorbitantly costly  
19 document production when it has nothing to do with any  
20 motivation, any showing that it related to these statements?

21           THE COURT: Okay. And I think you indicated that  
22 producing the raw data would be, you know, \$150,000, but that  
23 there are still existing analytics reports.

24           MR. WOLMAN: Yeah, on terms of Google analytics.

25           THE COURT: Yes.

1 MR. WOLMAN: And YouTube, I don't believe we can  
2 even access any analytics there were because, again, their  
3 accounts been terminated. You know, for the same reason  
4 Mr. Graves mentioned that we can't produce earnings.

5 THE COURT: All right. And it looks like from your  
6 response that Mr. Jones and Free Speech Systems do have some  
7 analytic documents that each one is withholding; is that  
8 right?

9 MR. WOLMAN: Mr. Jones, we answered, in his  
10 capacity, the possession company and control company that keep  
11 control. So to the extent he can control Free Speech Systems  
12 and that it's attributable to him, you know, anything he would  
13 have is actually in the possession of Free Speech Systems.

14 THE COURT: Okay. All right. Anything else on this  
15 topic?

16 MR. WOLMAN: I should note that to the extent that  
17 third request about communications, you know, again, that's  
18 going to have us do a search that we don't believe is  
19 necessary to do and then have us search over years and review  
20 however many communications regarding -- to determine what, if  
21 anything, is requested about analytics. Because other than  
22 the search term "analytics", one would have to look through  
23 potentially however many communications came with Alphabet,  
24 Facebook, or Twitter that might theoretically have some  
25 numbers in it or requesting some numbers. And so there's, you

1 know, an undue burden in that.

2 THE COURT: All right. All right. Thank you,  
3 Mr. Wolman.

4 All right. And Mr. Burns, what's your view?

5 MR. BURNS: Yes, Your Honor. I would echo a lot of  
6 the sentiment of Mr. Wolman. I think that in our case it's  
7 even more limited than in the case against Mr. Jones or Free  
8 Speech Systems or Infowars because the allegations against  
9 Mr. Hoft all relate to a single article. And the way that,  
10 you know, the Gateway Pundit works, Mr. Hoft's, you know,  
11 online blog is that there are about 40 or 45 articles that  
12 get -- you know, 30 to 45 articles per day that get published  
13 every, you know, day in, day out, seven days a week. The  
14 article that's at issue here in this case is a single article.  
15 There has been no deposition testimony suggesting that  
16 Mr. Hoft or Gateway Pundit look at analytical spikes or  
17 anything like that to drive their editorial process or article  
18 selection or anything like that. And so I think what our  
19 primary problem with the request is is that it's just way over  
20 broad and it's not tailored to the particular article at  
21 issue.

22 And if they want a baseline or something like that,  
23 I can -- you know, I can understand if they want a week before  
24 or a week after, something that was more meaningfully  
25 tailored. You know, given the fact that we're talking about a

1 single article, if they had something that they wanted to  
2 tailor it, we wouldn't object to that, assuming it was  
3 reasonable. But they're asking for 15 months' worth of data,  
4 I mean, of every shred of data that we have. And that just  
5 seems, frankly, oppressive.

6 THE COURT: I mean, describe to me what that looks  
7 like.

8 MR. BURNS: Well, let me look here.

9 MR. GRAVES: And, Your Honor, I can tell you. It's  
10 in the deposition testimony for -- at least for the Infowars  
11 defendants. I assume it's the same system.

12 THE COURT: I do want to hear from you in just a  
13 moment, but I'll hear from Mr. Burns on this.

14 MR. BURNS: Yes. So some of that is certainly true.  
15 However, I mean, it just -- to be perfectly honest, I'm not --  
16 I haven't gone through and looked for every, every -- under  
17 every single stone. I don't know -- so there's some answers  
18 to the question -- so some answers to these questions I don't  
19 know because it just -- I mean, it was facially, you know,  
20 it -- I mean, it was breathtaking to me. So, I mean, I know  
21 that it would be an enormous undertaking, let's put it that  
22 way.

23 THE COURT: All right. Mr. Hoft doesn't have any  
24 reports that are prepared that analyze -- or the, I guess, any  
25 document that analytics, it would all just be raw data from

1 him; is that right?

2 MR. BURNS: No. I mean, so, you know, Gateway  
3 Pundit does have access to a Google Analytics, you know,  
4 platform --

5 THE COURT: Mm-hmm.

6 MR. BURNS: -- which is pretty much what everybody  
7 uses. And initial -- as far as a, you know, the subsequent  
8 dispute that we'll be discussing in a few minutes, you know,  
9 we're about to turn over some information to plaintiff which  
10 will provide the information that they need so that they can  
11 see precisely what, you know, the analytics related to the  
12 article at issue. So, yeah.

13 THE COURT: Okay. All right. So you do have the  
14 information about the analytic -- analytics related to the one  
15 article?

16 MR. BURNS: Yes, Your Honor.

17 THE COURT: Okay. All right.

18 Mr. Burns, anything else?

19 MR. BURNS: No, Your Honor.

20 THE COURT: Okay. All right. For plaintiff?

21 MR. GRAVES: Yes, Your Honor. So, I guess first to  
22 talk about the burden of accessing these reports. So,  
23 again -- and if Your Honor permits us to brief this, we can  
24 point you to the testimony and attach it as an exhibit. But  
25 it's nowhere close to as onerous as it's being represented to



1 be. As the testimony explains, it's very much akin to logging  
2 on to your bank and downloading a certain period of data. You  
3 may go on there and say I want my bank statements from June to  
4 September. 15 bucks for the requested periods. You wait the  
5 ten seconds for that document to be prepared and then you open  
6 it from your download folder. That's it. There's nothing  
7 else that's crazy about it. It's the most simple task to  
8 retrieve.

9 So there isn't even a burden there or anything  
10 that's particularly onerous. And Mr. Hoft -- I'm sorry,  
11 Mr. Burns it seems like hasn't attempted to retrieve the data.  
12 But if he did, he would see that it really is a simple  
13 process.

14 Similarly, it seems like based on hearing  
15 Mr. Wolman's argument is that the standard is we need to have  
16 a preliminary showing that there was a business motivation  
17 involved before we can seek discovery into whether there  
18 actually was a business motivation involved. And that just  
19 seems very circular.

20 We have deposition testimony, again, as mentioned  
21 from five employees. We know three of them, or at least  
22 Mr. Du to still be currently there, that talks about how they  
23 do access the data and how they access it routinely, and for a  
24 specific purpose, which is the business purpose of determining  
25 what works to generate more sales to their website. So we

1 have a preliminary showing. Surely, we don't have one related  
2 to Gilmore. We haven't finished deposition practice. But  
3 it's clear that this provides relevant data.

4 And Your Honor has already mentioned this in your  
5 order and, as you mentioned earlier, found this to be relevant  
6 already. We're just trying to get the data which they are  
7 refusing to provide.

8 And again, the data release with regard to Free  
9 Speech Systems already exists.

10 So the Sandy Hook case, just to drive a little bit  
11 more color, their discovery request was around 2018, 2019. I  
12 believe Mr. Wolman just stated it was produced actually in  
13 2020. Our timeframe is just the reports within that same  
14 timeframe. We're looking at 2017 through 2018. So that data  
15 that was already produced in Sandy Hook would necessarily  
16 already be the same data that we're looking for because the  
17 Sandy Hook data has a longer timeframe than we do. They go to  
18 2020; we go to 2018. So it's nothing new. This is just  
19 simply going to be a copy job for the Free Speech Systems.  
20 And for Mr. Hoft, it's a downloading of a bank statement.

21 So that is -- that's basically all I have,  
22 Your Honor. And again, if Your Honor would like us to brief  
23 this issue, I'm happy to provide you with these exhibits and  
24 the deposition testimony by these Infowars or Free Speech  
25 Systems employees so you can review it yourself and see how

1 it's used and how easy it is to retrieve.

2 MR. WOLMAN: Your Honor, I need to make a correction  
3 of Mr. Graves's misrepresentation as to how analytics works.  
4 You know, you have to put in a specific request for a specific  
5 thing. It's not just you say state -- it's not a bank  
6 statement download. There are all sorts of different queries  
7 that you could run, thousands of different queries, hundreds  
8 of thousands of different queries, depending upon the  
9 permutations of their able -- you include. And what was  
10 produced for Sandy Hook was over a broader time period and  
11 therefore we cannot simply easily disambiguate.

12 You know, this is not what we believe has to do with  
13 anything in this case. And it's an excessive burden. This  
14 is, you know, this would not be a request that anybody would  
15 ever allow for the New York Times. It is not a request that  
16 anybody would ever allow for the Miami Herald. This is not  
17 something that then (inaudible) should be required to produce.

18 MR. BURNS: Your Honor, this is John Burns.  
19 (Inaudible.)

20 THE COURT: Mr. Wolman, tell me what that process  
21 for selecting -- (inaudible) put into the request for  
22 analytics, and what would that look like for the information  
23 that's been requested?

24 MR. WOLMAN: Well, it's tough to say, Your Honor,  
25 because, first, what happened in Connecticut was they asked

1 for similar things. And, you know, we produced a 35-page  
2 report and for some reason, Judge Bellows thought that was  
3 insufficient but didn't explain why, although she originally  
4 thought it was. And then the plaintiffs in that case provided  
5 a 100-page document of a few dozen, I don't remember how many  
6 there were, at least a dozen, different queries to run over,  
7 you know, broad periods of time. So those were specifically  
8 run based on individual queries that the plaintiff requested.  
9 Here, they haven't requested any particular query. They just  
10 say produce your analytics data. That just can't be done.  
11 There are, you know, hundreds of thousands of data points  
12 potentially. And in order to -- you can't just export all  
13 data points in the particular years, you have to produce a  
14 particular report. The only other alternative is to export  
15 the entire raw data set which costs, you know, in our  
16 understanding, at least \$150,000 to become an Analytics 360  
17 member, which gives you that access. We are not Analytics 360  
18 members. You know, it's not a simple process.

19 THE COURT: Okay. And Mr. -- okay. Mr. Graves, I  
20 take it you're not seeking all the raw data. Do you have a  
21 particular query in mind? How do you see that this process  
22 unfolding if I were to -- you know, if I were to require the  
23 defendants --

24 MR. GRAVES: We definitely can work with defendants  
25 to create a query. Again, I challenge the notion that it is

1 as onerous as Mr. Wolman is representing. Again, that's why I  
2 mentioned, we're happy to brief the issue and provide you the  
3 expert testimony related to this. But there is a -- I'm not  
4 quite sure what that query would look like. Again, I can look  
5 to see and meet and confer with them on this issue. But we  
6 weren't given that opportunity because we were told that we're  
7 not going to produce anything. And so that's why we haven't  
8 done the meet and confer process. Well, we did, but we were  
9 told none of this was relevant and so there was nothing that  
10 we could retrieve. However, if that door is now open again,  
11 we're happy to meet and confer with the defendants on that  
12 particular point.

13 But just on the overburden part, it sounds like from  
14 Mr. Wolman's representation that, again, the work has already  
15 been done, he just doesn't want to give us too much data. So  
16 the work is now going to be in limiting it. So, again, I  
17 defer to the Court, and I'm not sure if Mr. Wolman will accept  
18 responsibility, but you can just give us everything that you  
19 produced in Sandy Hook to reduce the burden. And therefore,  
20 there is no need for redactions and no need for any type of  
21 curating. That just comes over and we can analyze that to  
22 make things simple if that's the problem.

23 MR. WOLMAN: Now it sounds like they're asking for a  
24 different timeframe, an extended timeframe.

25 THE COURT: Right. And I'm not -- I understand

1 Mr. Graves's point. It does seem like, you know, that  
2 report -- it would encompass more information than has been  
3 sought and that I have said would be, you know, potentially  
4 relevant in this case. So, you know, it does seem like the,  
5 you know, the more tailored approach would be agreeing to a  
6 particular query.

7 MR. GRAVES: So we're happy to negotiate that with  
8 defendants. Again, the meet and confer was basically -- and  
9 I'm not blaming Mr. Wolman, he just didn't think there was  
10 anything regarding the topic was relevant, so we (inaudible).  
11 Happy to (indiscernible).

12 MR. WOLMAN: And what I'm hearing from them is, of  
13 course, they didn't propose -- they don't even know what  
14 they're looking for. They're just asking for everything,  
15 which is not what we should be required to produce.

16 THE COURT: Right.

17 MR. WOLMAN: And they didn't suggest anything more  
18 narrowly tailored that they actually need.

19 THE COURT: All right. And Mr. Burns, is there  
20 something else that you wanted to say?

21 MR. BURNS: No. I just wanted to echo a slight  
22 concern about the queries. You know, again, we're perfectly  
23 willing to discuss some sort of narrowed, tailored approach,  
24 perfectly willing to entertain that. Of course, my one  
25 concern is that, you know, is an endless stream of different

1 queries. And if we could just have -- I guess what I'm  
2 hearing is we need to confer to discuss the different queries  
3 or whatever. But just so long as there's not an endless train  
4 of, you know, new queries that are just popping up. Just so  
5 that we can keep it tight. That's all.

6 THE COURT: Okay. All right. Well here's what I'm  
7 going to do on this issue. I don't think it needs to be  
8 briefed any further. You know, this -- the nature of this  
9 information was briefed and argued. And I addressed it in an  
10 Order and Opinion back in January finding that as long as the  
11 requests were, you know, tailored to the time around the  
12 publications that the information would be relevant. You  
13 know, here these requests cover -- it's a little bit more than  
14 a year. I think that when you're analyzing trends and things  
15 like that that it's a reasonable timeframe. Perhaps it could  
16 be narrowed to 12 months, but I'm not sure that that really  
17 achieves much at all.

18 So let me just say this. I do think that the  
19 information sought is relevant. And it -- and I think any  
20 concern about the cost or the burdensomeness in producing raw  
21 data, it appears that that's not what plaintiff is requesting.  
22 And that that concern can be addressed by having the parties  
23 meet and confer on having a particular query for the  
24 information. And what I'm going to do is require that you-all  
25 would do that within the next seven days.

1           Like Mr. -- I echo Mr. Burns's concern about not  
2           having this go on and have repeated requests. I think this  
3           needs to be addressed soon and taken care of. So that's what  
4           I will ask that you-all do is that you meet and confer in the  
5           next seven days so that a particular query can be developed  
6           and that the resulting report of the analytics can be  
7           produced. I do think it's -- I think it's relevant.

8           MR. GRAVES: Yes, Your Honor, we will do that.

9           THE COURT: All right. Is there anything else on  
10          that issue?

11          MR. GRAVES: Nothing from plaintiff.

12          MR. WOLMAN: No, Your Honor.

13          MR. BURNS: No, Your Honor.

14          THE COURT: All right. Then moving on to the issues  
15          with Mr. Hoft.

16          MR. GRAVES: Yes, Your Honor. For this one, I'm  
17          going to defer to my colleague, Miss Kimya Saied. She'll be  
18          arguing for plaintiff with regard to Mr. Burns and Mr. Hoft.

19          THE COURT: All right. Miss Saied.

20          MS. SAIED: Good morning, Your Honor.

21          Plaintiff has identified four specific discovery  
22          issues regarding Mr. Hoft's discovery responses on which,  
23          Your Honor, guidance would be appreciate. And we're happy to  
24          take those in the order that they were laid out in the e-mails  
25          Mr. Hoft sent or whatever order Your Honor prefers.



1 THE COURT: That's fine.

2 MS. SAIED: Okay. I'll start with a bit of  
3 procedural background which I think underscores the difficulty  
4 plaintiff has faced in getting the discovery to which  
5 plaintiff is entitled and to also just timely and efficiently  
6 moving this case forward. All four discovery disputes concern  
7 information sought by plaintiff's first set of RFPs which  
8 plaintiff served in March of last year, so March 2020. At  
9 this point these requests have been outstanding for more than  
10 18 months. And they also concern information sought by the  
11 second set of RFPs which were served in January of this year,  
12 so ten months at this point.

13 Both sets of these RFPs were also the subject of the  
14 Court's April 2021 order, that's Docket 271, which required  
15 Mr. Hoft to supplement his production to the first set of RFPs  
16 by the end of April, and to RFP42 and the second set of RFPs  
17 by May 5th. This is all to say, Your Honor, plaintiff has  
18 been waiting for these discovery responses for months at this  
19 point and it's concerned that the continued delay will -- has  
20 severely prejudiced plaintiff's ability to advance this case  
21 and prepare for depositions now that we're nearing the end of  
22 fact discovery.

23 With that foundation, Your Honor, I'll take the  
24 first issue that was laid out in the e-mail which concerns  
25 plaintiff's RFPs seeking documents showing the revenue

1 generated by Mr. Hoft's defamatory publication. These RFPs  
2 were, again, a part of the first set from March 2020. In  
3 response to plaintiff's RFPs, Mr. Hoft did not assert any  
4 specific objections, instead representing that he would  
5 produce whatever documents he had in his possession.

6 In May of 2020, he produced four documents. None of  
7 those documents reflected the revenue generated by the  
8 defamatory publication. And in response to Your Honor's  
9 April 2021 order requiring Mr. Hoft to review and supplement  
10 his production to these RFPs by the end of April and early  
11 May, plaintiff had not received any responsive documents.  
12 Instead, last month, Your Honor, we learned that there were  
13 responsive documents that Mr. Hoft had just not yet produced.  
14 And he represented during our meet and confer that he would  
15 provide those documents to plaintiff by September 21st. And,  
16 unfortunately, we did not receive any documents from Mr. Hoft  
17 on that day. And we've also followed up multiple times over  
18 e-mail and our requests about the status of these documents,  
19 our e-mails have been ignored. So we would appreciate  
20 Your Honor's guidance on how best to move this forward, again,  
21 given how long this has been outstanding.

22 THE COURT: All right. Mr. Burns?

23 MR. BURNS: Yes, Your Honor. So, as far as that's  
24 concerned, as far as the revenue information for the  
25 particular article, as I indicated earlier in the hearing,

1 we're prepared to produce that today. We've got it, so we  
2 will turn those over today.

3 THE COURT: All right. And just e-mail that  
4 information over or how are you --

5 MR. BURNS: Yeah. There's only like two different  
6 documents, so, yeah, I will e-mail it to them.

7 THE COURT: Okay. All right.

8 All right. Is there -- Mr. Burns, is there any  
9 reason for the -- why is that issue coming to me to resolve  
10 here? It sounds like --

11 MR. BURNS: Your Honor, yeah. You know, Your Honor,  
12 I apologize about that. My client is currently a litigant in  
13 another lawsuit that required me to be in Denver all -- well,  
14 for most of last week. And it has been extremely challenging  
15 given the lack of human resources in that particular case  
16 because it's even more complex in some respects than -- well,  
17 it is more complex than this current case, and it has required  
18 nearly all of my attention. So I am sorry that it has come to  
19 this.

20 THE COURT: All right. Okay. Ms. Saied, let's move  
21 on to the second one.

22 Well, let me say this. Mr. Burns, of these other  
23 three categories, are you prepared to produce documents for  
24 any of these others as well or is there an actual dispute?

25 MR. BURNS: So the only actual dispute would be --

1 hold on, let me look through this one moment, Your Honor.

2 So for the fourth item, I'm waiting for about six --  
3 there's about six different of those text messages or Facebook  
4 messages that -- they're seeking the broader context, you  
5 know, for messages before and after. I'm waiting for a  
6 vendor, and I should have that by the end of the week. But  
7 all the rest of them I will be producing today.

8 For the -- they had a concern about -- for the third  
9 item. They had -- plaintiffs had a concern about metadata for  
10 all -- for various graphics, different items that were  
11 produced as part of a 94-page PDF. And according to our  
12 vendor, there are -- there is no native metadata except --  
13 except for one particular photograph. So we can produce that.  
14 I may need by the end of the week to get that particular one,  
15 but there's only a single one.

16 Let's see here. I guess the only real dispute here,  
17 Your Honor, would be the various social media accounts.  
18 Plaintiff asked -- so we had our vendor go through and try to  
19 pull these different social media accounts. Some of these  
20 different social media accounts, and there's a number of them,  
21 were only set up within the past 18 months or less. The  
22 difficulty has been that the vendor has not been able to gain  
23 access, not because of what -- not because of us. But they've  
24 either -- it's different in every case. It's different in --  
25 I mean, case by case. But in some of the cases the particular

1 social media platform won't give the vendor access to assist  
2 this -- to assist with this. I have written to some of the  
3 vendors -- I'm sorry, some of the different platforms asking  
4 them to just turn over access, you know, of our -- what are  
5 essentially Mr. Hoft's posts so that we can have --

6 THE COURT: Mr. Burns, are you still there?

7 Mr. Burns?

8 THE CLERK: He was connected, Your Honor. But now  
9 he just dropped from the call. So hopefully he'll call back  
10 in.

11 THE COURT: Okay. All right. Well why don't we  
12 just sit tight for a minute then.

13 THE CLERK: Okay.

14 MR. BURNS: Your Honor, this is John Burns. I got  
15 disconnected. I apologize. I don't know what happened.

16 THE COURT: That's okay. Thanks for calling back  
17 in. You were just telling me about your attempt to --

18 MR. BURNS: Yes. Yes, Your Honor.

19 THE COURT: -- (inaudible) platform.

20 MR. BURNS: Yes, sir.

21 So in some of the situations I tried to circumvent  
22 any sort of, you know, problem. Because in some instances,  
23 you know, their tech people were just simply not responding to  
24 the vendor. So I wrote, you know, to the legal, you know, web  
25 address for the site where I could find them. In the one

1 instance -- in the case of gab.com, their counsel wrote me  
2 back and said, you know, that I'd have to get a court order in  
3 order to get the information.

4 Now to this, plaintiff says, well, we want you to  
5 turn over all of your correspondence, you know, with these  
6 different -- these different platforms. And it just, you  
7 know, it's suggesting -- it's implying that I didn't actually  
8 do what I said I did. And it just simply kind of rubbed me  
9 the wrong way. Because it reminded me of something that  
10 Mr. Hassen Sayeed said in response to one of my pleadings in  
11 which I suggested that he misrepresented something. And he  
12 brought up a really good point that alleging misrepresentation  
13 is a very serious allegation.

14 So, I mean, we've done our due diligence. I've had  
15 vendors try to pull this information. We've turned over  
16 information where we were able to get it. If we have not been  
17 able to provide the information regarding the social media  
18 stuff, it hasn't been for a lack of trying. It's just  
19 simply -- it's, frankly, outside of our possession, custody,  
20 or control. And, you know, I think that it's -- at this point  
21 it's something that plaintiff just needs to subpoena.

22 THE COURT: Well, and are you willing to just  
23 provide a consent so that the plaintiff can access those?

24 MR. BURNS: Sure. Sure.

25 THE COURT: Yeah, okay.

1 MR. BURNS: So long as it's reasonable. And I'm  
2 willing to, you know, work with the plaintiff on setting those  
3 parameters. But absolutely. Yeah. No problem.

4 MS. SAIED: Your Honor, this is Kimya. May I  
5 respectfully interject and respond to some of those issues?

6 THE COURT: Yes. Hold on a second.

7 Mr. Burns, is there anything else?

8 MR. BURNS: I think that that's it.

9 THE COURT: Okay. All right. Miss Saied.

10 MS. SAIED: Sure. Your Honor, just in the interest  
11 of making sure the record is clear on what -- on what  
12 plaintiff has requested and what Mr. Burns is agreeing to  
13 provide by when. Taking that last issue first. The dispute  
14 concerns specifically 13 social media sites where either  
15 Mr. Hoft or Gateway Pundit maintains accounts and where  
16 plaintiff has not -- I should say Mr. Burns has represented  
17 that he has been unable to collect, search, or review the  
18 documents. We learned about this, these 13 sites, on  
19 September 20th. So that's months after the Court's deadline  
20 and well after -- well after when these responses were due  
21 last year. So we followed up with Mr. Burns inquiring about  
22 the specific basis for each of these sites and why it was not  
23 possible for Mr. Hoft to collect and review the responsive  
24 documents and merely trying to understand the basis for the  
25 delay. And Mr. Burns has not responded to three e-mails that

1 we have sent since September 20th wanting to understand the  
2 basis for the delay and whether, in fact, all of them were  
3 requiring, for example, a court order or not.

4 We are also somewhat skeptical that Mr. Hoft can't,  
5 in fact, access his own documents on at least some of these  
6 sites. A Google search shows that Gateway Pundit has been  
7 active on at least some of these sites as recently as this  
8 month. And under these circumstances, plaintiff thought it  
9 was reasonable to request either Mr. Hoft's correspondence  
10 reflecting his attempts to collect these documents from the  
11 social media accounts and/or substantiation to support his  
12 assertion that he can't access the documents on his own  
13 accounts.

14 As Your Honor may recall, earlier this year  
15 Mr. Stranahan made some similar claims regarding his access to  
16 documents on social media accounts. And Your Honor ordered  
17 Mr. Stranahan to provide plaintiff's counsel contact  
18 information and the correspondence for the individuals who may  
19 have the social media content. And that was the animating  
20 basis for plaintiff's request to Mr. Hoft. And plaintiff  
21 respectfully requests that a similar order makes sense here  
22 given the number of outstanding social media sites and the  
23 difficulty plaintiff has had in gaining any sort of detailed  
24 insight into the specific basis why we are still waiting  
25 18 months later for the documents from these sites to be



1 collected and reviewed for production.

2 I would also like to respond to the other two issues  
3 that Mr. Burns raised, but it might make sense for me to pause  
4 here and for us to resolve the social media issue before  
5 discussing the others.

6 THE COURT: And would having a concern for the  
7 plaintiff to be able to access the information directly  
8 through the e-mail, would that address some of your concerns?

9 MS. SAIED: I think, Your Honor, we could certainly  
10 be open to that. I'm just mindful that at the end of the day  
11 these are -- we don't want the burden to be on the plaintiff  
12 to try and discover the documents that are, at the end of the  
13 day, within Mr. Hoft's possession and control. These are  
14 documents on his social media account. But we certainly would  
15 be open to exploring, exploring as Your Honor suggests.

16 THE COURT: All right.

17 All right. Mr. Burns, can you address this issue  
18 about the social media accounts, and in particular that --

19 MR. BURNS: Sure.

20 THE COURT: Why is there so much trouble actually  
21 accessing these sites?

22 MR. BURNS: So, I'm -- I don't speak technology very  
23 well. So I'm slightly ignorant. So I'd like to draw a  
24 distinction between Mr. Hoft and Mr. Stranahan. Mr. Stranahan  
25 is, you know, obviously, operating pro se.

1 THE COURT: And I tell you, I mean, I really just  
2 want to hear, you know, what your efforts are. I didn't find  
3 that --

4 MR. BURNS: Sure. Sure.

5 THE COURT: -- (indiscernible) comparison.

6 MR. BURNS: Sure. So I'm relying upon primarily one  
7 particular -- one -- so all the different vendors that we've  
8 gone through have had certain capabilities and not -- and some  
9 capabilities they don't have. There's one particular vendor  
10 called Percipient which we relied upon to get all these  
11 different social media, you know, all the different social  
12 media information. And the process -- Miss Saied mentioned  
13 that, you know, that Mr. Hoft is posting. There's a  
14 difference between posting and then having the ability to  
15 actually download or pull the data so that you can then put  
16 the data into -- you know, I mean, whether it's relativity or  
17 logical, you know, put it into some format where you can  
18 actually cull through the information and search through it  
19 using, you know, the various, you know, key words that were  
20 agreed upon. Right? And so this is specifically what we  
21 tasked Percipient with doing.

22 And what they came back to us was, and we went  
23 around and around with, you know, so we were able to produce a  
24 number of these. Right? We were able to produce, I don't  
25 know, six or -- I don't know how many it was. But we were

1 able to produce a number of the different social media  
2 accounts because they were able to pull it. For the rest of  
3 them they just said, look, we're not able to get this. You  
4 know, we're not able to extract it. We've been working with,  
5 you know, these. We've reached out to -- in the situation  
6 with Twitter, for example, we've reached out to Twitter and  
7 they're just simply not, you know, playing ball. They're not  
8 willing to work with us.

9 So -- and so that's what I -- you know, in a, I  
10 guess, I can't remember what the date of the e-mail that I  
11 sent to Miss Saied, I mentioned that this is what we were able  
12 to get. This is what we weren't able to get. And we relied  
13 upon a vendor to do this.

14 We specifically got this vendor, among others, to  
15 ensure that we're looking over every -- you know, we're  
16 lifting up every rock to find everything that's responsive.  
17 And, you know, I just don't know what else to do, Your Honor,  
18 frankly.

19 THE COURT: What is Percipient telling you about  
20 Twitter, and why Twitter isn't --

21 MR. BURNS: So Twitter --

22 Yes. So Twitter -- Mr. Hoft's Twitter account was  
23 permanently suspended back in February. And so when that  
24 happens, they completely shut down access to your -- for lack  
25 of a better term, the back end where you can actually extract

1 the data.

2 THE COURT: All right.

3 MS. SAIED: Your Honor, may I briefly respond?

4 THE COURT: Sure.

5 MS. SAIED: Just for the sake of clarity, we are not  
6 looking for all data from these sites. We are specifically  
7 looking for his posts and dropped messages, to the extent that  
8 makes a difference. I hear Mr. Burns citing that it's hard to  
9 access or co-opt the data. We are specifically interested in  
10 actual posts.

11 And to make this more concrete, two of the social  
12 media sites or apps that are pending are, like, Signal and  
13 Telegram where messages and posts would be particularly  
14 relevant. And it can go through the other social media sites  
15 that are pending as well. So I'll defer to Your Honor on  
16 whether that would be helpful.

17 THE COURT: All right. Mr. Burns, I mean, is  
18 that -- can that information be pulled from the sites, just  
19 the posts and direct messages?

20 MR. BURNS: So here's the issue, Your Honor. You  
21 know, the sites that just speak generally about these  
22 different platforms, they don't have good strong search  
23 functionality. And so one of the reasons why we wanted to get  
24 the vendors in here, the whole genesis of us getting vendors  
25 in here was that the search features were inherently faulty.

1 And we couldn't be sure that we were -- you know, by putting  
2 the search terms in, you know, to the place -- to the  
3 platforms where you could actually search. Some of the  
4 platforms just simply don't allow you to search or their  
5 search functionality is just really awful.

6 So, the whole purpose of getting the -- of being  
7 able to extract the data was so that you could -- you know,  
8 for the -- you know, between the time periods of, you know,  
9 March of 2017, you know, through the present, was so that we  
10 could methodically and authoritatively and with finality  
11 search through the data, run it, you know, professionally, so  
12 that we could provide the plaintiff with something that we  
13 were absolutely certain was the full universe of information  
14 that was turned up, (indiscernible) the information that was  
15 turned up by those key word searches.

16 So I don't know of any other way to do it other than  
17 to extract the data because of the inherent limitations of the  
18 platforms.

19 THE COURT: All right. And with that -- I mean, is  
20 that what your vendors are telling you too?

21 MR. BURNS: Yes.

22 THE COURT: It can't harvest the codes and direct  
23 messages?

24 MR. BURNS: Yes. So for example -- yes, that's  
25 precisely correct. Again, as far as Twitter is concerned, we

1 can't -- it's the same story as with the posts, the direct  
2 messages are completely frozen. And we don't have access to  
3 them.

4 THE COURT: So, I mean, can Mr. Hoft even sign in to  
5 the Twitter account and see these posts?

6 MR. BURNS: So, yes and no. Mr. Hoft can sign into  
7 the account, but he can't see any of his own posts and he  
8 can't see any of his direct messages.

9 THE COURT: Okay. So those have all just then have  
10 been removed?

11 MR. BURNS: They're totally locked out. It's my  
12 understanding they exist, but we simply don't have it.  
13 There's no way that we can access them, short of a court  
14 order.

15 THE COURT: And is that the same for Signal and  
16 Telegram?

17 MR. BURNS: No. I think -- it's my understanding  
18 that for Signal and Telegram, along with some of these other  
19 ones, that they're simply just not cooperative.

20 THE COURT: All right. But are you -- Mr. Burns,  
21 are you -- if you could access these, do you think that  
22 they're not relevant? Is there any reason not to turn over  
23 the posts and direct messages from these social media  
24 accounts?

25 MR. BURNS: The ones that are -- to the extent that

1 they're relevant to the case, of course, they're relevant. If  
2 you're asking --

3 THE COURT: I was saying, is there the will to turn  
4 over these -- you know, these --

5 MR. BURNS: Yeah. Absolutely.

6 THE COURT: But you're just saying there's not the  
7 way?

8 MR. BURNS: Yes, Your Honor. We're not -- I'm not  
9 trying to be obstructionist here. In fact, I would like --  
10 really, I would like this issue to be over.

11 THE COURT: Is there -- you mentioned a court order  
12 would help. I mean --

13 MR. BURNS: Well, yes.

14 THE COURT: -- what kind of court order do you need?

15 MR. BURNS: Well, I mean, you know, if the Court  
16 would be so inclined, if we could get -- you know, frankly, I  
17 wouldn't even have a problem with -- if you were so inclined  
18 to grant us a court order which we could then take to these  
19 particular platforms. And if this is what plaintiff wants us  
20 to do, then that's fine. A court order saying look, turn over  
21 the information to Hoft so that -- or to Hoft's vendor so that  
22 he can cull through it and, you know, do what he needs to do  
23 with it. And I could draft up a proposed order if Your Honor  
24 would like to sign it. And we would be happy to take that to  
25 the various platforms and to serve it upon them.

1 THE COURT: All right.

2 Ms. Saied, is that something that you think would be  
3 effective and that you could work with Mr. Burns on to sort of  
4 craft a draft or that would, you know, require these platforms  
5 to give him access to the posts and messages that you want and  
6 to provide a timeframe for that production?

7 MS. SAIED: Yes, Your Honor, that seems fine to us.  
8 I think we're happy to work with Mr. Burns. And so long as  
9 Mr. Burns is taking on the burden of actually collecting and  
10 searching for the documents, we are happy to meet and confer  
11 with him leading up to that.

12 I think the only other thing that we're mindful of  
13 is just the late stage of discovery that we're at and making  
14 sure we are doing this on a timetable that is reasonable so  
15 that we can actually use the information that's collected for  
16 depositions and general case preparation.

17 THE COURT: Yeah. And what I would say is that in  
18 the order, you know, allow maybe 14 days for these platforms  
19 to produce the information and then there be some additional  
20 period for Mr. Burns to review that information after it's  
21 produced. I would think another 14 days would be adequate.  
22 And if you-all can -- can you get together on that order and  
23 present it to me? I'll get it signed and entered.

24 MR. BURNS: Sure.

25 MR. GRAVES: Yes, Your Honor.



1 MS. SAIED: Yes, Your Honor.

2 THE COURT: Okay. All right.

3 Does that address, I guess, this fourth topic about  
4 the social media?

5 MS. SAIED: That's right, Your Honor.

6 THE COURT: Okay.

7 MS. SAIED: The fourth topic I believe is resolved.  
8 If Your Honor will permit me to respond to the other two  
9 issues that Mr. Burns touched on.

10 THE COURT: Yes.

11 MS. SAIED: I believe Mr. Burns indicated -- the  
12 second issue concerns Mr. Hoft's production of text messages  
13 that omitted the relevant surrounding the preceding and  
14 subsequent messages from each produced message, as well as  
15 omitting the identity of the person's involved in the  
16 responsive conversations. And I understand from Mr. Burns  
17 that he just represented that he would -- he would be willing  
18 to supplement his production and provide the preceding and  
19 subsequent messages, as well as identify the persons involved  
20 in the conversation. I think the part that just gives me  
21 pause, Your Honor, is we -- the parties -- I should say,  
22 plaintiffs received Mr. Hoft's production in August. The  
23 parties met and conferred about this very issue and the fact  
24 that the messages as we had received them, they were not  
25 usable to the plaintiff. We're not able to review them and

1 understand what we're looking at. And we asked Mr. Burns what  
2 was a reasonable date by which he would be able to supplement  
3 the production. And he suggested October 1st. Plaintiff did  
4 not receive any documents from Mr. Hoft on that day. And we  
5 have since followed up with Mr. Burns via e-mail and have  
6 received no responses. And so I think there is just -- while  
7 I appreciate the offer I made on today's call with the Court  
8 about supplementing the production with the surrounding  
9 messages and identifying the identities of the individuals on  
10 each conversation, we are just mindful of Mr. Hoft's prior  
11 discovery record and the late stage of discovery and want to  
12 make sure this is resolved in a timely way.

13 THE COURT: It sounds like Mr. Burns has committed  
14 to producing some of this information today and then some by  
15 the end of the week. And I am going to issue just a short  
16 order today that would note that commitment, but also order  
17 that it be done according to that schedule.

18 MS. SAIED: Great, Your Honor.

19 So I understood Mr. Burns to say that the documents  
20 reflecting the revenue generated from the defamatory  
21 publication, we would be receiving those documents today. And  
22 that based on what Your Honor just said, that we would be  
23 receiving the surrounding text messages to the 62 messages  
24 Mr. Hoft previously produced by the end of this week.

25 So if that understanding is correct, that works for

1 plaintiff.

2 THE COURT: That's what I thought Mr. Burns said.

3 Mr. Burns, is that right?

4 MR. BURNS: That is correct, Your Honor.

5 THE COURT: Okay. All right. And then for the,  
6 like, for the third item, it's not like there was one  
7 additional or some additional metadata about one document that  
8 you thought you would produce by the end of the week. Is that  
9 also true?

10 MR. BURNS: Yes, Your Honor. I just have to -- I  
11 have to get that particular item from one of the vendors  
12 and -- but that shouldn't be a problem.

13 MS. SAIED: And on that point, Your Honor, if I may.  
14 This is a 94-page PDF that is very -- I would say impossible  
15 to understand what we are looking at. It combines several  
16 otherwise separate e-mail communications, Facebook screen  
17 shots, other miscellaneous images. And we met and conferred  
18 about this in June. And Mr. Hoft represented that he would  
19 remedy the deficiencies. And I just, I guess I want to make  
20 sure will we be receiving an entirely corrected production  
21 such that we can actually understand what documents go with  
22 which -- go together and what are actually separate documents  
23 and what their sources are? It's just not -- I'm not quite  
24 sure on what Mr. Burns has represented he would remedy.

25 THE COURT: Okay. Mr. Burns.

1 MR. BURNS: Yes, Your Honor. That would also fall  
2 under the ambit of the end-of-the-week representation.

3 THE COURT: Okay. So to break out these, these  
4 different groups of documents that were in that 94-page PDF so  
5 that it's (indiscernible), but --

6 MR. BURNS: Comprehensible, yes.

7 THE COURT: Okay. Okay.

8 All right. Ms. Saied, anything else on that?

9 MS. SAIED: No, Your Honor. I would just -- I guess  
10 we would just ask for your court's guidance to the extent we  
11 have not received some or all of these documents by the end of  
12 the week, what would -- should we go ahead and reach out to  
13 Miss Dotson? We would appreciate your guidance on the best  
14 way to resolve it to the extent these discovery issues are not  
15 addressed by the end of the week.

16 THE COURT: Well, Mr. -- here's what I'll tell you.  
17 Mr. Burns, if there's something unforeseen, out of your  
18 control that delays that production, please tell the  
19 plaintiff's counsel about that and give them an update for  
20 when it will be done. I don't expect that there is going to  
21 be any further delay, but sometimes things happen.

22 MR. BURNS: Certainly, Your Honor. I will do that.

23 THE COURT: And if it is something that is  
24 unreasonably, you know, Ms. Saied, then please let Miss Dotson  
25 know on Monday and we can go ahead and get it, get it back on.

1           Yeah, at some point -- Mr. Burns, I feel like you're  
2     working through this. And I know you have a lot of other  
3     things to do, but at some point there are just going to have  
4     to be some sanctions that fall for delayed productions. And  
5     I, you know, I think we're probably getting close to that.  
6     But I feel like you're working through this. I know that  
7     you're -- I think that you're working in good faith on this,  
8     so I certainly don't think it's time. But at a certain point  
9     it's just, you know, one of those things we'll have to -- my  
10    hands will just be tied at a certain point, okay?

11           MR. BURNS: Yes, Your Honor. I understand.

12           THE COURT: All right.

13           All right. Anything else to take up today?

14           MS. SAIED: Nothing from the plaintiff, Your Honor.

15           MR. WOLMAN: This is Jay Wolman. No, Your Honor.

16           THE COURT: All right. Okay. Counsel, thank you  
17     all for calling in. And Mr. Creighton, thank you for calling  
18     in. And take care. Bye.

19           (FTR recording concluded at 10:56 A.M.)  
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**REPORTER'S CERTIFICATE**

I, DONNA J. PRATHER, do hereby certify that the above and foregoing, consisting of the preceding 53 pages, constitutes a true and accurate transcription of the FTR recording provided, and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this November 4, 2021.

S/Donna J. Prather  
DONNA J. PRATHER, RPR, CRR, CBC, CCP  
Federal Official Court Reporter